Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah (Sureshan Marcandan, party cited)

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–1554 OF 2009
YEOH WEE SIAM J
2 NOVEMBER 2011

Family Law — Divorce — Adultery — Proof — Circumstantial evidence of adultery — Nature of evidence required — Whether fact that wife and third party male lived in the same condominium was prove of adultery — Whether adultery proven beyond reasonable doubt

Family Law — Divorce — Ancillary relief — Application for — Whether wife in divorce proceedings could claim arrears of salary, director's fees and her share of profits in companies owned by husband — Whether claim within the ambit of s 76 of the Law Reform (Marriage and Divorce) Act 1976

Family Law — Divorce — Maintenance — Assessment of maintenance for children

Family Law — Divorce — Maintenance — Assessment of maintenance for wife — Means and needs of parties — Degree of responsibility for breakdown of marriage — Duty of husband to maintain wife at same standard of living that she had enjoyed before the break down of the marriage — Duty of wife to take up employment — Law Reform (Marriage and Divorce) Act 1976 s 78

Family Law — Matrimonial property — Division of property — Financial contribution — Properties purchased before, during and after marriage — Whether property a matrimonial home or matrimonial asset — Property acquired by sole effort of husband — Non-monetary contributions of wife as housewife — Infidelity of wife — Whether wife entitled to a share in property — Law Reform (Marriage and Divorce) Act 1976 s 76(3) & (4)

Family Law — Matrimonial property — EPF contributions — Whether wife to be given share in EPF account of husband

Family Law — Matrimonial property — Household items — Whether wife could retain household items taken from matrimonial home

The petitioner wife ('the PW') and the respondent husband ('the RH') were married on 31 August 1994. They had four children. PW left RH and the matrimonial home on 11 August 2008. The parties agreed that custody, care and control of the four children be given to the PW, with reasonable access to the RH. The issues left to be tried were: (i) division of the matrimonial assets; (ii) maintenance for the four children; (iii) maintenance for PW; and (iv) RH's claim against the party cited for adultery with the PW. PW had worked for companies owned by RH but she was not paid her salary from July 2008 onwards. PW testified that RH had been an abusive, aggressive and violent husband and father. PW's evidence was corroborated by the evidence of her two children, PW3 and PW4. On the other hand, RH attempted to prove that PW was a serial adulteress and this had caused the breakdown of the marriage and therefore PW was not entitled to maintenance.

Held:

(1) In relation to properties purchased before the marriage, PW was not entitled to any share in these properties as there was no proof of contribution by her towards the acquiring of these assets, or her contribution to substantially improve these properties during the marriage (see paras 12, 15–17 & 23–24).

(2) In relation to properties purchased before the marriage and payment of loan made during the marriage, in view of PW's monetary contributions, PW was entitled to a share in these properties. As for properties where there was no proof of monetary contribution by the PW towards the acquiring of the property, PW's non-monetary contribution made to the welfare of the family by looking after the home and caring for the family had to be recognised and therefore PW was entitled to a share of these properties (see paras 28, 32, 34, 43, 45–46 & 51).

(3) In relation to properties purchased after the marriage, these were paid with monies from the joint account of PW and RH. PW had also contributed towards the acquiring of these matrimonial assets by contributing to the welfare of the family by looking after the home and caring for the family. Hence, PW was entitled to a share of these properties (see paras 55, 56(c) & 57).

(4) The court could not make any order regarding PW's claim against RH for arrears of her salary and director's fees, and her share of profits in the companies. This was because such claims, based on company law, ought not to be made against the RH personally, and they were also outside the ambit of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). Such claims should be made by way of a separate civil suit against any of the three companies since each company was a separate legal entity and could be sued in its own name (see para 66).

(5) As for RH's claim for the household items of RM50,000 taken by PW from the matrimonial home, the court allowed PW to keep these items for her benefit and the benefit of the children. Otherwise, the court would have had to order the RH to pay even more maintenance since it was his duty to provide proper accommodation for the four children and the PW, together with all the appliances and furnishings (see para 72).

(6) Since the monies in the EPF were earned by the sole efforts of the RH, and, on principle, were meant for his retirement, it was just for PW to be given only a 25% share and RH to be given a 75% share of such EPF monies (see para 73).

(7) RH was ordered to pay to PW a monthly maintenance of RM2,000 for each of the three younger children. RH was also ordered to further pay the school fees, transportation costs, and other education expenses of these three children. As for the eldest child, PW3, RH was ordered to pay PW RM3,000 per month as PW's maintenance. RH was also further ordered to pay the school fees, transportation costs, and other education costs of PW3. Further, RH had to pay the medical and dental expenses of the four children (see paras 78 & 80–81).

(8) Under s 78 of the LRA the court, when assessing maintenance for a wife or former wife, shall base its assessment on: (a) the means and needs of the parties; and (b) the degree responsibility which the court apportions to each party for the breakdown of the marriage (see para 84).

(9) There was no evidence to prove that PW was working. The PW maintained that she was not working but was taking care of the children. It was therefore the duty of RH to maintain her, as far as possible, on the same standard of living that she had enjoyed before the marriage broke down. However, since the three younger children were studying in India and PW3 was already of an age where she was quite independent, PW should consider taking up employment for herself (see paras 85–86).

(10) Sufficient evidence had been adduced by PW to prove that RH did cause the irretrievable breakdown of the marriage through his unreasonable behaviour. RH's allegations of PW's adultery with four men had not been substantiated by direct evidence of actual acts of adultery being committed on specific dates, times and places. None of the four men were called as witnesses. The standard of proof regarding adultery is proof beyond reasonable doubt and the onus of so satisfying the court rests upon the person making the allegation of adultery. RH's further allegation of PW's adultery with the party cited was also not proven. The fact that the party cited was living together with PW at his condominium did not prove adultery between them (see paras 98, 101(d) & 102).

(11) However, the supporting or circumstantial evidence, including all the photographs tendered in court by RH, proved that there was an

unusually close relationship between PW and the party cited. For this, the court apportioned to the PW a high degree of responsibility for the breakdown of the marriage in order to assess maintenance for the PW under s 78 of the LRA. Hence, the court found that both PW and RH had contributed equally to the breakdown of the marriage. Therefore, instead of awarding PW a monthly maintenance of RM10,000 a month as claimed, the court only awarded PW a sum of RM3,750 as her monthly maintenance (see paras 103–104).

(12)RH's claim against the party cited for adultery with PW was dismissed since there was no proof beyond reasonable doubt of any adultery between the party cited and the PW (see para 108).

[Bahasa Malaysia summary

Pempetisyen isteri ('PI') dan responden suami ('RS') telah berkahwin pada 31 Ogos 1994. Mereka mempunyai empat orang anak. PI meninggalkan RS dan rumah perkahwinan pada 11 Ogos 2008. Pihak-pihak bersetuju bahawa hak penjagaan, pemeliharaan dan kawalan keempat-empat anak diberikan kepada PI, dengan akses munasabah kepada RS. Isu-isu yang masih perlu dibicarakan adalah: (i) pembahagian harta perkahwinan; (ii) nafkah bagi empat orang anak; (iii) nafkah bagi PI; dan (iv) tuntutan RS terhadap pihak yang dikaitkan dengan kecurangan dengan PI. PI telah bekerja bagi syarikat yang dimiliki oleh RS tetapi dia tidak dibayar gajinya sejak dari bulan Julai 2008. PI memberi keterangan bahawa RS adalah suami dan bapa yang mendera, agresif dan ganas. Keterangan PI disokong oleh keterangan dua daripada anak-anaknya, PW3 dan PW4. Sebaliknya, RS mencuba untuk membuktikan bahawa PI adalah pelaku curang bersiri dan ini membawa kepada kegagalan perkahwinan dan dengan itu PI tidak berhak untuk nafkah.

Diputuskan:

(1) Berkaitan dengan hartanah yang dibeli sebelum perkahwinan, PI tidak berhak kepada apa-apa bahagian di dalam hartanah ini kerana tidak ada bukti sumbangannya terhadap pembelian aset-aset ini, atau sumbangannya untuk pembaikan secara substansial hartanah-hartanah ini semasa berkahwin (lihat perenggan 12,15–17 & 23–24).

(2) Berkaitan dengan hartanah yang dibeli semasa perkahwinan dan pembayaran pinjaman yang dibuat semasa masih berkahwin, melihat sumbangan kewangan PI, PI berhak kepada bahagian di dalam hartanah-hartanah ini. Berkaitan dengan hartanah di mana tidak ada bukti sumbangan kewangan oleh PI dalam memperoleh hartanah tersebut, sumbangan bukan dalam bentuk wang oleh PI terhadap kebajikan keluarga dengan menjaga rumah dan keluarga perlu diberi perhatian dan dengan itu PI berhak kepada bahagian dalam hartanah-hartanah ini (lihat perenggan 28, 32, 34, 43, 45–46 & 51).

(3) Berkaitan dengan hartanah yang dibeli selepas perkahwinan, ini dibayar dengan wang daripada akaun bersama PI dan RS. PI juga telah menyumbang untuk membeli aset-aset perkahwinan ini dengan menyumbang kepada kebajikan keluarga dengan menjaga rumah dan mengambil berat terhadap keluarga. Dengan itu, PI berhak untuk bahagian di dalam hartanah-hartanah ini (lihat perenggan 55, 56(c) & 57).

(4) Mahkamah tidak boleh membuat apa-apa perintah berikatan dengan tuntutan PI terhadap RS bagi tunggakan gajinya dan fi pengarahnya dan bahagian keuntungannya di dalam syarikat-syarikat tersebut. Ini adalah kerana tuntutan sebegitu, berasaskan undang-undang syarikat, tidak boleh dibuat terhadap RS secara peribadi, dan ia juga adalah di luar rangkuman s 76 Akta Membaharut Undang-Undang (Perkahwinan dan Perceraian) 1976 ('AMU'). Tuntutan sedemikian perlu dibuat melalui guaman sivil berasingan terhadap mana-mana tiga syarikat tersebut kerana setiap syarikat adalah entiti undang-undang yang berlainan dan boleh disaman atas namanya sendiri (lihat perenggan 66).

(5) Berhubung dengan tuntutan RS bagi barangan rumah sejumlah RM50,000 yang diambil oleh PI daripada rumah perkahwinan tersebut, mahkamah membenarkan PI menyimpan barangan ini bagi faedahnya dan faedah anak-anak. Jika tidak mahkamah akan perlu memerintahkan RS membayar nafkah yang lebih tinggi kerana ia adalah tanggungjawabnya untuk memperuntukkan tempat tinggal yang sepatutnya bagi keempat-empat anak dan PI, bersama dengan barangan rumah dan perabot (lihat perenggan 72).

(6) Oleh sebab wang di dalam KWSP diperoleh dari usaha tunggal RS, dan, atas prinsip, adalah untuk persaraannya, adalah adil untuk PI diberikan hanya 25% bahagian dan RS diberikan 75% bahagian dalam wang KWSP tersebut (lihat perenggan 73).

(7) RS diarahkan membayar PI nafkah bulanan sebanyak RM2,000 bagi setiap tiga anak yang lebih kecil. RS juga selanjutnya diperintahkan membayar yuran sekolah, kos perjalanan dan perbelanjaan pembelajaran yang lain bagi ketiga-tiga anak ini. Bagi anak sulung PW3, RS diarahkan membayar PI RM3,000 sebulan sebagai nafkah Dhanisha. RS juga selanjutnya diarahkan membayar yuran sekolah, kos perjalanan dan lain-lain kos pembelajaran PW3. Selanjutnya, RS perlu membayar perbelanjaan perubatan dan pergigian bagi keempat-empat anak (lihat perenggan 78 & 80–81).

(8) Di bawah s 78 APU mahkamah, apabila menilai nafkah bagi isteri atau bekas isteri, perlu mendasarkan penilaiannya atas: (a) kemampuan dan keperluan pihak-pihak; dan (b) tahap kewajipan yang mahkamah bahagikan kepada setiap pihak bagi kegagalan perkahwinan tersebut (lihat perenggan 84).

(9) Tidak ada keterangan untuk membuktikan bahawa PI bekerja. PI menyatakan bahawa dia tidak bekerja tetapi menjaga anak-anak. Oleh itu adalah tanggungjawab RS untuk memberi nafkah kepadanya, setakat yang boleh, atas taraf hidup yang sama seperti yang dinikmatinya sebelum kegagalan perkahwinan. Walau bagaimanapun, oleh sebab tiga anak-anak yang lebih kecil belajar di India, dan PW3 telah pun mencapai usia di mana dia boleh berdikari, PI perlu mempertimbangkan untuk mencari kerja bagi (lihat perenggan 85–86).

(10) Keterangan yang mencukupi dikemukakan oleh PI untuk membuktikan bahawa RS telah menyebabkan kegagalan perkahwinan yang tidak boleh diselamatkan melalui perangainya yang tidak munasabah. Dakwaan RS tentang kecurangan PI dengan empat lelaki tidak disokong oleh keterangan langsung tindakan curang tersebut dilakukan pada tarikh, masa dan tempat yang spesifik. Tidak ada satu pun dari empat lelaki tersebut dipanggil sebagai saksi. Standard pembuktian bagi pelakuan curang adalah melampaui tahap keraguan munasabah dan beban memuaskan mahkamah adalah pada orang yang membuat dakwaan kecurangan tersebut. Dakwaan lanjut RS mengenai kecurangan PI dengan pihak yang dinyatakan juga tidak dibuktikan. Fakta bahawa pihak yang dinyatakan tinggal bersama dengan PI di kondominiumnya tidak membuktikan kecurangan di antara mereka (lihat perenggan 98, 101(d) & 102).

(11) Walau bagaimanapun, keterangan sokongan dan ikut keadaan, termasuk gambar-gambar yang dikemukakan di mahkamah oleh RS, membuktikan bahawa terdapat perhubungan intim yang tidak biasa di antara PW dan pihak yang dinyatakan. Bagi ini, mahkamah meletakkan atas PI tahap tanggungjawab yang tinggi bagi kegagalan perkahwinan untuk menilai nafkah bagi PI di bawah s 78 AMU. Dengan itu, mahkamah mendapati bahawa kedua-dua PI dan RS menyumbang sama rata kepada kegagalan perkahwinan tersebut. Oleh demikian, di sebalik mengawardkan kepada PI nafkah bulanan RM10,000 sebulan seperti yang dituntut, mahkamah hanya mengawardkan PI jumlah sebanyak RM3,750 sebagai nafkah bulanannya (lihat perenggan 103–104).

(12) Tuntutan RS terhadap pihak yang dinyatakan bagi kecurangan dengan PI ditolak kerana tidak ada bukti melampaui keraguan munasabah bagi apa-apa kecurangan di antara pihak yang dinyatakan dan PI (lihat perenggan 108).]

Notes

For a case on EPF contributions, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 4255.

For cases on adultery, see 7(2) *Mallal's Digest*(4th Ed, 2011 Reissue) paras 3549–3566.

For cases on ancullary releif, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3607–3612.
For cases on division of property, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4152–4254.
For cases on maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3790–3829.
For cases on matrimonial property generally, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4125–4284.

Cases referred to

Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors [1982] 1 MLJ 198, FC (refd)
Wee Hock Guan v Chia Chit Neo & Anor [1964] 1 MLJ 217, (refd)

Legislation referred to

Domestic Voilence Act 1994
Evidence Act 1950 ss 73A(2), 80
Law Reform (Marriage and Divorce) Act 1976 ss 76, 77(1), 78, 92
Stamp Act 1949 s 52

Kalearasu Veloo (Shoba Murugiah with him) (SF Chan & Co) for the petitioner wife.
Rajinder Singh Veriah (Clinton Nicholas Gomez with him) (Rajindar Singh Veriah & Co) for the respondent husband.
Party cited not present and not legally represented.

Yeoh Wee Siam J:

BRIEF FACTS

[1] The petitioner wife ('the PW') and the respondent husband ('the RH') were married on 31 August 1994. They have four children, namely, Dhanisha a/p Kanagasingam (date of birth: 21 April 1995), Lohanesh a/l Kanagasingam (date of birth: 14 November 1997), Surekha a/p Kanagasingam (date of birth: 16 April 1999) and Venesh a/l Kanagasingam (date of birth: 13 April 2000).

[2] The PW left the RH and the matrimonial home on 11 August 2008.

[3] Vide the court order dated 7 July 2009 in Originating Summons ('OS') No 24–129 of 2008 (exh P9A of PW's BOD), the court granted custody of the eldest child, Dhanisha, to the RH, and custody of the other three children to the PW, and a maintenance of RM2,000 for each of the other three children, to be paid to the PW.

[4] Vide another court order dated 22 June 2010 (exh P98 of PW's BOD)

the court allowed the PW's application for the three children to study in the Jain International School in Bangalore, India. The RH was given reasonable access to the three children in India and in Malaysia.

SCOPE OF THE HEARING

[5] At the outset of the hearing of this divorce petition (encl 1), both learned counsel informed the court that the following are agreed to by both parties, and therefore would not be subject to trial:

(a) that the marriage be dissolved; and

(b) that custody, care and control of the four children be given to the PW, with reasonable access to the RH.

[6] The issues left to be tried are as follows:

(a) division of the matrimonial assets;

(b) maintenance for the four children;

(c) maintenance for the PW; and

(d) the RH's claim against the party cited for adultery with the PW.

DIVISION OF THE MATRIMONIAL ASSETS

[7] The governing provision is s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') which provides as follows:

76 Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to —

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial

separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to —

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Properties purchased before the marriage

Shop lot identified as S 167, 2nd Floor, Sungai Wang Plaza, Jalan Sultan Ismail, 55100 Kuala Lumpur

[8] This property was purchased by the RH on 19 December 1989 for RM90,000, before the marriage of the RH to the PW.

[9] The petitioner contended that she had acquired an interest in this property by paying the rates, insurance, and collecting the rentals relating to this property, and finding tenants. There is no documentary evidence adduced by her on this. It is more probable that the RH made all these payments. The RH stated that he himself collected the rental for this property.

[10] In July/August 1992 the RH completed paying the loan for this property (exh R149 of bundle I).

[11] Currently, this shop lot is rented out for the sum of RM3,300 per month.

[12] The PW is not entitled to any share of this property, including the rent. There is no proof of contribution by her towards the acquiring of this asset, or her contribution to substantially improve this property during the marriage.

Shop Lot No 545, Orchard Road # 10–03 (ie 10th Floor, Unit No 3) Far East Shopping Centre

[13] This property was purchased by the RH before his marriage to the PW for SGD365,000 (exhs R151 and R152) using his money from the Central Provident Fund ('CPF') of Singapore (exh R67 of bundle E). The purchase price was paid in full by the RH on 1 June 1992 from the RH's CPF withdrawal and his savings in Singapore.

[14] The RH sold this property in 2005 at a price of SGD287,000 and he received RM438,000 after paying the monies due to the CPF (exh R68 of bundle F).

[15] There is no order by the court for division of this property since the property has already been sold during the marriage. In any case, this property was purchased before the marriage and there is no evidence that the PW contributed towards the acquiring of this property, or contributed to the substantial improvement of this property during the marriage.

Land in Taman Yarl, Kuala Lumpur

[16] The RH purchased this property in 1990 at a price of RM75,000 (exh R155 of bundle E). The purchase price was paid in full by the RH on 22 June 1994, before he married the PW.

[17] The PW could not prove that she had acquired an interest in this property by paying the rates and insurance. No documentary evidence was adduced by her on this. Neither did she prove that she had contributed to the substantial improvement of this property during the marriage.

[18] The PW be is not entitled to any share of this property.

No 31 and 31A, Tingkat 1, Sentul Pasar, Kuala Lumpur, a double storey house

[19] The RH jointly purchased this property with his sister, Nagayswary a/p A Kandiah in 1985, before the RH's marriage to the PW. The property was paid for in full by the RH in 1989.

[20] The PW is claiming 50% of this property, stating that she contributed by paying the rates, insurance and collecting the rentals. The RH denied this. He stated that he is the one who made such payments and he collected the rental on behalf of his sister.

[21] Currently, this house is rented out by the RH for RM450 per month for the upstairs. The downstairs ie No 31 is owned by the RH's sister.

[22] It is more probable that the PW did not make any contribution for the payment of the rates and insurance or collected the rent. There is no documentary evidence adduced by her on this.

[23] The PW also could not prove that she had contributed to the substantial improvement of this property during the marriage. Therefore, the PW is not entitled to any share of this property, including the rent.

No 6, 4/4B Section 4, Petaling Jaya, purchased on 5 July 1994

[24] Full payment for this property was made on 9 August 1994. I did not grant any share of this property to the PW for the same reasons as in (a), (c) and (d) above.

Properties purchased before the marriage and payment of loan made during the marriage

Condominium in No 323, 3rd Floor, Menara Seputeh, Kuala Lumpur

[25] This property was purchased by the RH on 12 July 1993, before the marriage. The RH paid a sum of RM10,000 and obtained a loan from Arab Malaysian Finance Bhd to pay the balance purchase price. The loan was fully paid by the RH in 2002 using the proceeds of sale of his shares in Clearpack (M) Sdn Bhd (exhs R86, 162 and 163 of bundle E).

[26] The RH stated that he paid more than 25% of the purchase price before his marriage to the PW. The balance of 75% was paid in the course of the marriage and the RH conceded that the PW has a 35% interest in this property.

[27] The PW stated that she had acquired an interest in this property through her contributions in taking care of the home and caring for the family as a wife and mother.

[28] In view of her contributions, and bearing in mind the concession made by the RH here, the court holds that the PW is entitled to a half share of this property based on the 75% of the balance of purchase price that was paid during the marriage. Therefore, the court orders that the PW be given 37.5% share and the RH 62.5% share of this property.

No 15B, Bougainvilla Apartment, Changkat Thamby Dollah, Jalan 1/77B, Bukit Bintang, Kuala Lumpur

[29] The RH purchased this property at a price of RM309,890 on 24 August 1990. Before his marriage to the PW on 31 August 1994, the RH had paid a sum of RM150,000 towards the purchase price of this condominium.

[30] The RH obtained a loan from MBf Finance Bhd and the loan was settled in full from the sum of RM469,866.96 which the RH had kept in his DBS Bank account in Singapore while he was employed in Singapore from 1978 to 1990 (exh R150 of bundle E). He brought back this money to Malaysia in September 1998.

[31] The PW contended that she had acquired an interest in this property by paying for the rates and insurance, but she did not adduce any documentary evidence on this.

[32] There is no proof of monetary contribution by the PW towards the acquiring of this property. There is also no proof that she contributed towards the substantial improvement of this property during the marriage. The only contribution made by the PW is to the welfare of the family by looking after the home and caring for the family. However, the fact is that the RH only made full payment of the loan during the marriage, which means that the non-monetary contributions of the PW must be recognised. I therefore hold that PW is entitled to 25% and the RH 75% share of this property.

Factory Lot No 28, Jalan TPP5/5, Taman Perindustrian Puchong

[33] This property was purchased by the RH on 21 October 1993. He paid a deposit of about RM29,000 and he obtained a loan of RM260,000 from MBf Finance Bhd to assist him to pay the balance of the purchase price. Before 31 August 1994, the RH had paid a total sum of RM80,000 towards the purchase price. The RH contended that the loan was fully paid by him at the end of 2002 using his savings in DBS Bank Singapore.

[34] The RH maintained that this property was fully paid by him. There is no proof of any monetary contribution by the PW. However, the loan was only fully paid during the marriage. The PW contended that she had acquired an interest in this property by her contribution in looking after the home and caring for the family, as a wife and mother, during the marriage. I therefore hold that the PW is entitled to 25% share and the RH 75% share of this property.

A Land at Tropicana Golf and Country Resort, Damansara ie No 22, TR 8/3, Tropicana Golf and Country Resort (land purchased on 24 September 1992, and house built in 2002)

B **[35]** The RH purchased this land on 24 July 1992 before his marriage to the PW at a price of RM450,590 (exh R57 of bundle E). As at July 1993 he had paid a total sum of RM250,590 progressively towards the purchase price of this property (exhs R58, 59, 60, 61, 62, 72, 73, 74, 75, 76, 77, 78, 79, 153, 154, 155 and 156 of bundle E).

C

[36] Thereafter, he obtained a loan from Arab Malaysian Finance Bhd to pay the balance of the purchase price (exhs R63, 157 and 158 of bundle E). The loan was fully paid by the RH in early 1996, during the RH's marriage to the PW.

D

[37] The PW contended that at the time of her marriage she brought along between RM60,000 to RM70,000 into the family. However, she did not adduce any documentary evidence to support her contention. The RH denied the PW's contention.

E

[38] In 1997 the RH planned to construct a bungalow on the Tropicana land. He alleged that, for this purpose, he borrowed RM1,282,722.96 from his sister, Nagasothey Kandiah ('RW5'), an Australian national, from January 1997 to October 1999. He also applied for a loan of RM500,000 from F Bumiputra-Commerce Bank Bhd on 24 February 2000. In June 2000 he made an application to his Employee Provident Fund ('EPF') for a withdrawal of RM74,571 for the same purpose.

G **[39]** The total cost of construction of the bungalow is RM1,300,000 ie RM752,800 for construction works and RM550,000 towards the interior and exterior works of the house.

[40] The PW contended that the RH did not borrow the RM1,282,722.96 H from Nagasothey. Instead, Nagasothey had kept those monies in her own fixed deposits in Malaysia due to the high interest rate at that time, and the PW had even taken Nagasothey to the banks for that purpose.

[41] Nagasothey testified that she gave the loan of RM1,282,722.97 to the I RH for the purpose of construction of the Tropicana bungalow. However, the loan agreement between the RH and Nagasothey (exh R166, p 328 of bundle E) was not stamped and therefore not admissible as evidence under s 52 of the Stamp Act 1949 (see also *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198).

[42] It is more probable that the RH did not borrow the RM1,282,772.97 from Nagasothey to construct the bungalow. As submitted by learned counsel for the PW, there is no reason for the RH to borrow from Nagasothey from as early as 1997 when he only started constructing the bungalow in the year 2000. It is highly probable that the RH is using the excuse of the loan from his sister in order to increase his liability thereby reducing the net amount of this property that can be divided between him and the PW.

[43] There is no proof of any direct monetary contribution by the PW towards the purchase of the Tropicana land and the construction cost of the bungalow, except for the evidence that the loan for the balance of the purchase price of the land and the loan for the construction cost were paid during the marriage. The PW contended that the RH's office and their house were raided by the Income Tax Department for non-payment or under-declaration of income tax. The RH denied that it was a raid. He contended that the income tax officers came to his office and looked at his files and came up with a fresh assessment of taxes ie RM664,000 (including penalties) for the years of assessment 1991 to 1995, which the RH duly paid. He stated that he did not burden the PW with the income tax assessment. Instead, he paid for the taxes using his own funds ie his profits of RM332,000 from his purchase of units S003 and S004 in 1996 and that was enough to pay for the income tax assessment and instalments.

[44] Much as the RH denied it, it is highly probable that matrimonial monies, and the profits from units S003 and S004 in 1996, were used by the RH to pay the extra income tax assessment. This shows that the PW had therefore contributed indirectly towards paying the balance of payment for the purchase of the land, and the cost of construction of the Tropicana bungalow.

[45] The other contribution by the PW regarding this property is her non-monetary contribution to the welfare of the family by looking after the home and caring for the family.

[46] For the PWs contributions as stated above, the court orders that the PW be given a 30% share and the RH a 70% share of the Tropicana land and bungalow.

(e) A shop lot identified as T090, Sungai Wang Plaza, Kuala Lumpur

[47] This property was purchased by the RH on 1 March 1994 at a price of RM190,000. The RH obtained a loan of RM152,152 from Eon Bank Bhd to assist him in paying the purchase price.

[48] Before the marriage on 31 August 1994, the RH had paid a total of

RM57,000 towards the purchase price. The loan was fully paid by the RH sometime in the middle of 2003. The RH contended that he used the proceeds of sale of his shares in Clearpack (M) Sdn Bhd.

[49] According to the RH, in 1992 he was employed by Clearpack (M) Sdn Bhd, and he acquired shares in that company (exh P140 of bundle E). The PW did not in any way contribute to the acquisition of the shares. The shares were fully paid by the RH in 1992, 1993 and 2000. He sold the shares in July 2002 for USD178,947.37 (RM680,000). He was paid in US currency by the purchaser of his shares. He was also paid RM170,000 being the profits carried forward for Clearpack (M) Sdn Bhd (exhs R91, R167, R168 and R169 of bundle E).

[50] The PW is unable to rebut the RH's evidence that he is the one who paid fully for the purchase of this property.

[51] The evidence shows that there is no monetary contribution by the PW, and the RH fully paid for the property. However, since the balance of the loan was only paid by the RH in 2003, during the marriage, and the PW had contributed by taking care of the home and caring for the family, I therefore hold that the PW is entitled to 25% share and the RH 75% share of this property.

[52] This property has been sold by the RH on 10 November 2003 for RM450,000 (exh R171 of bundle I). The proceeds of sale were kept in the joint account of the RH and the PW in Southern Bank (exh R171 of bundle I).

Properties purchased after the marriage

[53] The following properties were purchased after the marriage:

(a) land in College Heights, purchased on 18 March 1998: full payment made in 21 December 2001;

(b) factory Lot No 30, Jalan TPP 5/5 Puchong, purchased on 26 May 2004: settlement via joint account;

(c) factory Lot 26, Jalan TPP 5/5 Puchong purchased on 18 August 2005: settlement via joint account;

(d) factory Lot 32, Jalan TPP 5/5 Puchong, purchased on 5 August 2002: settlement via joint account;

(e) house No 38 at Lakeside Puchong, purchased on 29 March 2007: purchased under the PW's name for RM343,000 and sold by the PW at RM365,000; and

(f) house No 40, at Lakeside Puchong, purchased on 29 March 2007 — purchased under the PW's name for RM343,000 and sold by the PW at RM385,000.

[54] Surplus for both the properties in (e) and (f) above, after paying penalties and legal fees, amounts to RM20,000.

[55] The above properties in (g) to (f) were paid with monies from the joint account of the PW and the RH.

[56] For these properties, I considered the pleadings of both parties, the totality of all evidence adduced, and the written submissions filed. I further considered following factors:

(a) The RH is the person making payments most of the time. He is the one who has been bringing in the income and monies into the joint accounts of both parties.;

(b) The PW only contributed her salary to their joint account in Southern Bank Bhd for eight months in 2004. However, between October 2004 to August 2008, the PW's salary from Anshidas Company Sdn Bhd totaling RM267,005.60 and from Icebreakers (M) Sdn Bhd between 2004 to 2006 totaling RM79,625 were saved by the PW in her own personal bank account without the RH's knowledge. This in effect means that there was no monetary contribution by the PW from 2004 to 2006 towards the acquiring of the above matrimonial assets

(c) The PW's main contribution towards the acquiring of the above matrimonial assets is to the welfare of the family by looking after the home and caring for the family.

[57] By adopting a broad brush approach, I hold that based on the contributions of both parties towards the acquiring of the above matrimonial assets, the PW is entitled to 35% share and the RH is entitled to 65% share of the above properties. This applies similarly where properties have already been sold, as in the case of house No 38 and house No 40 at Lakeside Puchong. The net proceeds of the sale of both houses are to be divided according to the same 35% share and 65% share as above (Note: due to the editorial error, the decision of the court dated 31 October 2011 at p 4 is to be amended accordingly to reflect the division of 35% share for the PW and 65% share for the RH for the properties in (a) to (d)).

Shares in the three companies

[58] The RH and PW held various shares in the three companies as follows:

(a) Mitsuya Pack & Systems (M) Sdn Bhd ('Mitsuya'):

PW – 15% shareholding
RH – 55% shareholding
(Note: 20% shareholding by one Krishnamoorthy and 10% shareholding by one Katsumi Mitsunaga);

(b) Anshidas Co Sdn Bhd ('Anshidas'):
PW – 49% shareholding
RH – 51% shareholding; and

(c) Ice Breakers Sdn Bhd ('Ice Breakers'):
PW – 1% shareholding
RH – 99% shareholding.

[59] Mitsuya and Anshidas were set up by the RH. When these two companies were formed, the RH was the director and majority shareholder.

[60] Similarly, Ice Breakers was set up by the RH. In 1995 the RH appointed the PW as a Director of Ice Breakers and gave her a nominal share of 1 % in the company.

[61] According to the RH, the PW was an air stewardess with Malaysia Airlines System Bhd before their marriage. After marriage, she resigned and became a housewife. The RH made the PW a Director of Ice Breakers so that she would be able to receive some income and have savings in the EPF. The PW continued receiving an income from this company until 2006 only because by the end of 2006 the company's business was not doing well.

[62] The RH also stated that in 2004 the PW requested that Anshidas pays her a salary, and in March 2004 Anshidas started paying her a salary and made contributions to her EPF. The PW continued to receive an income from Anshidas until the end of September 2008.

[63] The PW gave evidence that she worked in all the above three companies. She was working even when she was pregnant with each of the four children. She was paid a salary and made EPF contributions. She was the marketing manager of Anshidas but she was not paid her salary of RM7,500 per month from July 2008 onwards. She had also taken substantial loans jointly with the RH through their joint account in Citibank which monies were loaned to the companies. This was not disputed by the RH.

[64] It is clear from the evidence that the RW and PH had worked hard together to improve the business in the three companies by their joint efforts. However, it is also clear that the RH is the primemover, and had contributed

more than the PW in carrying out the business and operations in all the three companies, considering his business skills and past working experience in Singapore.

[65] I therefore hold that the PW is entitled to 35% of their total shareholding in the three companies and the RH is entitled to 65% of such shareholding. In the event that any party wishes to retain any of the shares which has been divided by this court in this order, then that party is required to pay the other party cash which is equivalent to the value of the shares of the other party. For this purpose, the court orders that the value of such shares are to be valued by an independent valuer to be agreed to and appointed by both parties. The costs of such valuation are to be borne equally by both parties.

[66] The court makes no order regarding the PW's claim against the RH for arrears of her salary and director's fees, and her share of profits in the companies. This is for the reason that such claims, based on company law, ought not to be made against the RH personally, and they are also outside the ambit of s 76 of the LRA. Such claims should be made by way of a separate civil suit against any of the three companies since each company is a separate legal entity and can be sued in its own name.

[67] Regarding the claims for the three motor vehicles, since these vehicles were acquired during the marriage, they are therefore matrimonial assets. The RH made all the monetary contributions towards the purchase of these vehicles, but the PW made non-monetary contributions by looking after the home and caring for the family. Therefore, a just division under s 76 of the LRA would be 50% share for the PW and 50% share for the RH.

[68] As for the RH's claim against the PW for the RM15,000 that was paid by the insurance company, MSIG Insurance (Malaysia) Bhd to her when the Proton Iswara 1.5 WJK 5511 was stolen, the court makes no order since such payment was made during the marriage and there is no proof that the money still exists today for division by the court under s 76 of the LRA.

[69] Regarding the RH's claims against the PW for her withdrawal of monies from their joint accounts, or from the safe at the matrimonial home, the court makes no order on these claims due to insufficient evidence adduced by the RH to prove that such monies still exist today for division to be made under s 76 of the LRA. The PW's explanation is that most of the monies that she had withdrawn had been used by her for the maintenance and education of the children. Even though the solicitors for the RH had given the PW a notice to produce all documents on matters within her knowledge or custody, the PW had failed to do so. The court takes note of this, and the court further considers the fact that large sums of money had been withdrawn by the PW from their

joint accounts, without the knowledge of the RH. This has been factored in by the court when making a decision on the division of matrimonial assets.

[70] The court also considers the PW's evidence that the RH collected rental from the matrimonial assets without giving the PW her share. This is also taken into account by the court in making its decision on the division of the matrimonial assets.

[71] Regarding the RH's claim for the jewelry worth RM100,00 taken by the PW, purchased between 1994 to 2008, the court did not make any order due to insufficient evidence being adduced on the acquisition by the RH of such jewelry, and whether such jewelry still exist.

[72] As for the RH's claim for the household items of RM50,000 taken by the PW from the matrimonial home, I allowed the PW to keep these items for her benefit and the benefit of the children. Otherwise, the court would have to order the RH to pay even more maintenance since it is his duty to provide proper accommodation for the four children and the PW, together with all the appliances and furnishings.

[73] Regarding the PW's claim for the RH's EPF, since the monies in the EPF were earned by the sole efforts of the RH, and, on principle, are meant for his retirement, the court is of the opinion that it is just for the PW to be given only a 25% share and the RH to be given a 75% share of such EPF monies.

MAINTENANCE FOR THE FOUR CHILDREN

[74] Section 92 of the LRA provides as follows:

> 92 Duty to maintain children.
>
> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

[75] The PW was not allowed to enter her office ever since the marriage broke down. There is no proof that she has been working since then. The responsibility to maintain the four children therefore now falls upon the RH.

[76] The PW contended that the RH earns about RM60,000 a month and he collects rental from all their properties. There is no evidence on the actual income of the RH.

[77] The RH contended that his earnings per month after the relevant deductions, expenses and obligations is RM535.25 per month (exh R313, bundle F). This is highly improbable and not credible considering that the RH is a man of means, owning numerous properties, collecting rent from the properties and profits from the companies (without giving the PW any share), and starting another new company with his brother known as AK Success, travels abroad for work, and lives in a luxurious bungalow, with his girl friend, Revathy Manogaran, in Tropicana Golf and Country Resort.

[78] Both parties did not appeal against the current court order in OS No 24–129 of 2008, which is a final order. The court now adopts that same order for the purposes of this divorce petition ie the RH is ordered to pay to the PW a monthly maintenance of RM2,000 for each of the three younger children, namely, Lohanesh, Surekha and Venesh. He is now further ordered to pay the school fees, transportation costs, and other education expenses of these three children. At the time when the court made the order dated 26 June 2010 allowing the three children to study in India, the PW stated that she has the means to pay for the children's education expenses. The PW now informs the court that she is unable to continue paying for the three children's education expenses in India which, together with the living expenses, amount to about RM170,000 per year.

[79] As for the eldest child, Dhanisha, the PW submitted that the monthly expenses for this child is about RM5,740 including school fees. Dhanisha is not studying in India but is now studying in the Global Indian International School in Kuala Lumpur.

[80] This court orders the RH to pay the PW RM3,000 per month for the maintenance of Dhanisha. The RH is also further ordered to pay for the school fees, transportation costs, and other education costs of Dhanisha.

[81] The RH is also ordered to pay the medical and dental expenses of the four children of the marriage and/or by taking up a medical insurance policy.

MAINTENANCE FOR THE PW

[82] Under s 77(1) of the LRA, the court has the power to order a man to pay maintenance to his wife or former wife when granting a decree of divorce.

[83] Section 78 of the same Act provides for the assessment of maintenance as follows:

78 Assessment of maintenance

> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

[84] Under s 78 of the LRA the court, when assessing maintenance for a wife or former wife, shall base its assessment on:

(a) the means and needs of the parties; and

(b) the degree responsibility which the court apportions to each party for the breakdown of the marriage.

Means and needs of parties

[85] There is no evidence adduced by the PW regarding her present means and her monthly expenses. She denied having worked for Brain Matters (M) Sdn Bhd as a consultant in business development. Learned counsel for the RH submitted that this denial contradicts the PW's police report dated 21 November 2008 (p 13 of bundle B) where she had stated that she was working as a management consultant. I note that the PW's subsequent police reports eg the police reports in pp 14 and 15 of bundle B did not state her occupation. In bundle B at p 19, in her police report dated 14 July 2009, the PW stated that she was a housewife. There is no evidence adduced by the RH to prove that the PW is now working. The PW maintained that she is now not working, but is taking care of the children. In her submissions, she claims a monthly maintenance of RM10,000.

[86] I proceeded on the basis that currently the PW is not working. It is therefore the duty of the RH to maintain her, as far as possible, on the same standard of living that she had enjoyed before the marriage broke down. Notwithstanding that, I also considered the fact that if the three younger children are indeed studying in India now, and Dhanisha is already of an age where she is quite independent, then the PW should consider taking up employment for herself. After all, she was previously working before she was not allowed to go to her office by the RH, and at the same time taking care of the children.

Degree of responsibility for breakdown of the marriage

[87] Both parties have agreed to the divorce, so there is no necessity for the court to consider whether there is an irretrievable breakdown of the marriage. However, for the purpose of the PW's claim for maintenance, the court has to

determine the degree of responsibility that each party has for the breakdown of the marriage in order to assess the appropriate maintenance for the wife.

[88] The PW testified that the RH had been an abusive, aggressive, and violent husband and father. She stated that she was assaulted by the RH from the very beginning of the marriage but she perservered and conceived the first child shortly after the marriage. The abuse continued throughout the period of this pregnancy and even after that. She further alleged that on one occasion she had a miscarriage and lost a baby due to stress caused by domestic violence. She stated that she had met with one Sergeant Pramella who repeatedly advised her to pursue with investigation. When the RH got to know of this, he threatened the PW that he would track her down and pour acid on her face because he has ample money at his disposal to do so.

[89] The PW also stated that all the abuse and domestic violence happened in the 13 years since 1995. On 7 January 2008 Surekha, who was then about nine years old, was traumatised when she was stripped and beaten badly, and she was swung by her hair by the RH. Venesh had injuries when he was beaten by the RH until the clothes hanger broke.

[90] On 8 June 2008 the RH beat up the children with clothes hangers and locked them up individually in the room. This was the last straw and the PW then seriously contemplated leaving the matrimonial home in order to protect her safety and security and that of her children.

[91] Again on 9 July 2008 the RH attacked the children and the PW made two police reports ie dated 8 June 2008 and 9 July 2008.

[92] The PW also adduced the following documentary evidence of the abuse by the RH:

(a) exhs P3, PA, P5(a) — (i) (pp 7–23 of bundle B), the police reports by the PW showing proof of reporting on assault by the RH;

(b) exh P8 (p 23(a) of bundle B), interim protection order under the Domestic Violence Act 1994;

(c) exhs P6(a) and P6(b) (pp 24–29 of bundle B), report to the attorney general's office for investigation;

(d) exh P10 (p 30 of bundle B), police acknowledgement of investigation;

(e) exh P9 (pp 31–34 of bundle B), restraining order against the RH against violent assault on the PW and the children;

(f) exhs P333, 334, 335 (pp 100–102 of bundle L), police reports;

(g) exh P144 (p 125 of bundle L), Women's Aid Organisation ('WAO') report; and

(h) exh 339 (p 115–116 of bundle L), medical report on Dhanisha.

[93] I did not give much weight to the WAO report (P144) since PW2, the WAO representative, admitted that she did not witness the domestic violence by the RH. She wrote her report based on records put before her.

[94] The application for an interim protection order ('IPO') in ID-P337 (pp 105–110 of bundle L), and the IPO given by the magistrate for Dhanisha in ID-P338 (pp 105–110 of bundle L) were initially marked as a ID on objection by learned counsel for the RH that the maker of the document must be called as witness. However, after considering the submissions of learned counsel for the PW, I agree that these documents can be admitted as evidence:

(a) under s 73A(2) of the Evidence Act 1950 to avoid undue delay or expense in calling the magistrate as a witness; and

(b) under s 80 of the Evidence Act 1950, which provides, inter alia, that when any document is produced before any court by a witness in a judicial proceeding purporting to be signed by a magistrate, the court shall presume that the document is genuine, any statements as to the circumstances under which it is taken are true, and any such evidence or statement was duly taken.

[95] The statutory declaration by Mariammah Arokiam, now deceased (ID-P7, pp 39–41 of bundle B), initially marked as an ID due to objection by learned counsel for the RH, can also be admitted as evidence under s 73A(2) of the Evidence Act 1950 on the ground that the condition that the maker of the statement shall be called as a witness need not be satisfied if she is dead.

[96] Be that as it may, even if the court were to reject the documents in ID-P337, ID-P338 and ID-P7 as being in admissible evidence, there is ample other documentary evidence, as listed above, to corroborate the PW's oral evidence.

[97] The PW's evidence is further corroborated by the evidence of her two children, Dhanisha ('PW3'), and Lohanesh ('PW4'). Both confirmed that the RH had been abusive, violent and short tempered, and had assaulted the PW and the children over the years of the marriage. Their witness statements, in PW3-WS and PW4-WS respectively, contain the details of the physical attacks by the RH of the PW and the children, in particular of PW3 and PW4. Their evidence remained intact under cross-examination. Having treated the evidence of these two children with caution, and after considering the evidence

of the PW, PW3 and PW4 in totality, I find that it is highly probable that the RH had been an abusive husband and father due to his personal issue with anger management. He used to fly into a rage and beat the PW frequently eg when she questioned him that he has been unfaithful to her. I did consider the fact that the police did not take any further action against the RH after its investigation, and the RH was not charged in court. However, what matters here is that, even if there is no prosecution of the RH, there is clear oral and documentary evidence that proves that the RH was responsible for the frequent domestic violence and trauma that took place in the marriage and family. The PW and the children feared for their safety and security.

[98] I am therefore satisfied that sufficient evidence has been adduced by the PW to prove that the RH did cause the irretrievable breakdown of the marriage through his unreasonable behaviour.

[99] On the other hand, the RH attempted to prove that the PW is a serial adulteress and this has caused the breakdown of the marriage and therefore the PW is not entitled to maintenance under the LRA.

[100] I find that the RH's allegations of the PW's adultery with four men in 1996, 2001, 2004 and 2005, two of whom are Giri and Ashok, have not been substantiated by direct evidence of actual acts of adultery being committed on specific dates, times and places. None of the four men were called as witnesses. The standard of proof regarding adultery is proof beyond reasonable doubt and the onus of so satisfying the court rests upon the person making the allegation of adultery (see *Wee Hock Guan v Chia Chit Neo & Anor* [1964] MLJ 217). The RH failed to satisfy the court with evidence of the PW's adultery with Giri, Ashok and two other men in the years stated above.

[101] The RH further alleged that the PW committed adultery with the party cited, namely, Sureshan Marcandan, an Australian national. The RH adduced the following evidence:

(a) the photographs at pp 706, 707, 708, 709 and 710 of bundle F (ID-R261, ID-123, ID-R124, ID-R125 and ID-R126 respectively). The photographs were marked as ID on objection by learned counsel for the PW that the maker must be called as a witness. However, during the hearing, the PW admitted and confirmed that the persons shown in these photographs are herself and the party cited, in particular, the photograph at p 710 of bundle F (ID-R126), which appeared in an Indian newspaper (exh R342) contains the following caption:

> Dr Suresh Marcandan with wife Shireen seen at the awards night of Bandaranaike International Diplomatic Training Institute. ('the newspaper photograph and caption').

The PW stated that the party cited is a very close family friend, and nothing more. She attempted to show this honourable court that she had purportedly issued a letter dated 10 January 2009 to Mrs Kamini Mukunthan ('Mrs Kamini'), Wijaya Newspapers, Hunupitiya Cross Road, Colombo (two) which notified Mrs Kamini that the PW was wrongly identified as Dr Suresh Marcandan's wife in the Indian newspaper. However, the PW could not produce any evidence to show that she did in fact send out this letter to Mrs Kamini. The RH had sought confirmation from Mrs Kamini that she did not receive this letter. Therefore, it is more probable that the PW did not send the letter dated 10 January 2009 to Ms Kamini, seeking a correction of the newspaper caption.

In my opinion, the newspaper photograph and caption is a report by the Indian newspaper stating that the party cited appeared with his wife ie the PW. It is obvious that the Indian newspaper has made a mistake of fact and law since at the time when the newspaper photograph and caption were published, the PW is still married to the RH. The journalist, editor and publisher of the Indian newspaper were not called as witnesses by the RH to verify the truth of the report. The newspaper photograph and caption therefore cannot be accepted by the court as proof beyond reasonable doubt of the PW's adultery with the party cited;

(b) the RH alleged in his answer to the divorce petition in para 20(a) that the PW was having an affair with the party cited since 11 August 2008 in Apartment 2, Tingkat 12-2, Block 1, Bangsar Puteri, Jalan Medan Serai, Bangsar. However, in his witness statement in answer to Q – 123 (RW1-WS), he stated that he first saw the party cited in October 2008 when the police requested him to go to the condominium of the party cited at the same Apartment 2 to indentify the items which he reported had been taken away by the PW when she left the matrimonial home. The PW denied that she was living with the party cited at his condominium. She stated that the party cited was merely helping her, in her difficult time of need, after she had left the matrimonial home, by allowing her to store her furniture and belongings in a spare room in his condominium. The PW stated that as at 9 October 2008, she was still living at the rented property known as A-06/02, Bayu Angkasa, Jalan Medang Kapas, Bangsar, and not at the condominium of the party cited. Here again, the court is not satisfied that the RH has proved adultery between the PW and the party cited;

(c) the RH also alleged that in the Tenby School admission records of the three younger children, it was stated that the party cited stayed at the same address as the PW. In my view, having the same address does not prove adultery beyond reasonable doubt, more so when the three children were then living with the PW. The children, PW3 and PW4,

were not cross-examined to adduce evidence of the PWs adultery with the party cited, when there was ample opportunity for learned counsel for the RH to do so;

(d) the RH's second witness, Seevaratnam Jegatheeswaran ('RW2'), a Sri Lankan national, did not state that there was an affair between the PW and the party cited. In cross-examination, he merely stated that in November 2009, while he was in Malaysia, when he went to fetch his daughter from the Tenby International School, he met the party cited who told him that he was at the school to fetch his children. The party cited gave his business card to RW2 (exh R343). Shortly afterwards, RW2 saw the PW with three children, approaching the party cited. The party cited introduced PW to RW2 as his wife. The party cited, PW and the children then left the school. RW2 saw the party cited and the PW holding hands while walking out of the school reception area.

The court considers RW2's evidence with caution: he was sitting in open court on the second and third day of hearing and observing the PW giving her evidence when he should be sitting outside the court room since he would later be called as a witness. Upon question by the court, RW2 admitted that he is an alternate Director of Alpha Beta Engineering, a company linked to the RH's elder brother, who is a shareholder of AK Success, which new company is also owned by the RH, and the RH had given notice to the clients of Anshidas and Mitsuya that the business of Anshidas and Mitsyua had been taken over by AK Success. Due to RW2's association with the RH's elder brother, and therefore indirectly to the RH as well, I do not attach much weight to RW2's evidence against the PW and the party cited.

In any case, RW's evidence does not prove adultery between the PW and the party cited. Even if the party cited had informed RW2 that he was at the school to fetch his children, the fact remains that the children are not the children of the party cited;

(e) the RH's third witness, Sevan ('RW3') who was the PW's personal driver, employed by Anshidas from 12 July 2007 to 18 July 2008 stated that the PW had instructed him on several occasions to drive her to meet the party cited at his work place at the PWTC building, usually around lunch time, between 12.30pm to 1pm. RW3 admitted that he did not see anything else because he sat in the car. RW3's evidence does not prove that adultery had been committed by the party cited and the PW;

(f) the RH's fourth witness, Nesamani Peter ('RW4') stated that she did not see the PW and the party cited together, but she heard from the other staff in her company, Asiatic Shipping Services Inc at PWTC building, that the PW and the party cited had lunch together. The court rejects this as hearsay evidence. RW4 stated that she was asked to investigate on the party cited, who was then working in her company, because the RH had complained to her company that the party cited was having an affair with

the RH's wife and this was in February 2009. RW4 admitted that she did not interview the PW and the party cited regarding the issue of adultery. She confirmed that the party cited left the company — owned apartment at Unit 44–11–2 Bangsar Putri, Bukit Bandaraya, Kuala Lumpur, and sent an email to her company informing them of his new address at Li Villas Condominium, No 1 Jalan 16/20, Petaling Jaya. RW4 further stated that she did not send her report on the party cited to the Immigration Department but she only prepared the report on the instruction of her boss. As submitted by learned counsel for the PW, it is very suspicious that this letter by RW4 dated 23 February 2009 to the immigration ended up in the hands of the RH. It is questionable whether there was collusion between the RH and RW4.

[102] Once again, here the RH attempted to show that the party cited was living together with PW at his condominium in Li Villas, but having the same address does not prove adultery between the two persons.

[103] Based on the evidence given by the RH and his witnesses, there is no proof of any sexual act or adultery between the PW and the party cited. It has been well accepted that it is extremely difficult to prove adultery because rarely can one catch the guilty parties engaged in the actual adulterous act. In the absence of any direct evidence to that effect, the court can weigh other supporting or circumstantial evidence on the matter. However, in this case, even such other evidence adduced by the RH does not prove conclusively that the PW committed adultery with the party cited. At best, the other supporting or circumstantial evidence, including all the photographs tendered in court by the RH, prove that there is an unusually close relationship between the PW and the party cited. For this, the court apportions to the PW a high degree of responsibility for the breakdown of the marriage in order to assess maintenance for the PW under s 78 of the LRA.

[104] Based on the evidence adduced, the court arrives at a finding that both the PW and RH had contributed equally to the breakdown of the marriage. Therefore, instead of awarding the PW a monthly maintenance of RM10,000 a month (which claim was also not substantiated by actual itemised expenses of the PW), I am awarding a sum of RM3,750 as the wife's monthly maintenance, which I think is reasonable and just.

[105] I have considered and taken into account the fact that previously the PW was earning about RM7,500 per month from her work in the companies. The sum of maintenance awarded to the PW is half of her last drawn salary. The PW is expected to go and earn a living after this considering that she was working continuously before the marriage broke down.

[106] Regarding the court orders allowing the continued membership and use and enjoyment by the PW and the children of the club at Tropicana Golf and Country Club, and the time sharing with vacation superclub membership agreement with Tanco Resorts Bhd, this is based on the rationale that status quo in terms of maintenance on the same standard of living should be preserved, as far as possible, for the PW and the four children even with the dissolution of the marriage.

[107] Similarly, any existing insurance policy for the benefit of the PW and the four children should continue to be paid for by the RH.

RH'S CLAIM AGAINST THE PARTY CITED FOR ADULTERY WITH THE PW

[108] As stated above in the court's evaluation of whether the PW committed adultery with the party cited, when assessing the wife's maintenance, the court finds that there is no proof beyond reasonable doubt of any adultery between the party cited and the PW. Accordingly, the claim for damages for adultery against the party cited is dismissed with costs. I did not deem it fit to award costs to the party cited since he did not deem it fit to be present for the hearing even though the RH had served the cause papers and the various notices of hearing on him through substituted service.

[109] Based on the above, I therefore ordered accordingly (see the decision of the court dated 31 October 2011 for the various court orders made).

Ordered accordingly.

Reported by Kanesh Sundrum